

## THE EUROPEAN COURT FOR HUMAN RIGHTS CHANGES THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

*Harun Išerić B.A. iur.*

### ABSTRACT<sup>610</sup>

In December 1995 by signing General Framework Agreement for Peace, Bosnia and Herzegovina got a new constitution by which country got a new internal organizational structure: it is divided into two entities: Federation B&H (FB&H) and Republic of Srpska (RS). The Collective Head of State is now the Presidency of Bosnia and Herzegovina. It is composed of three members: Bosniak & Croat (both chosen from the territory of The Federation of BiH) and Serb member (chosen from the territory of Republika Srpska). The upper house of the Parliamentary Assembly is The House of Peoples of BiH which gathers 15 delegates: 5 Bosniaks, 5 Croats (chosen by Parliament of Federation of BiH) and 5 Serbs (chosen by Parliament of Republika Srpska).

*Prima facie* are obvious the discriminations of all those who do not declare themselves as Bosniaks, Serbs or Croats, as well as the discrimination of these ethnic groups based on the entity they live in. This assertion was confirmed by the European Court of Human Rights in the case of *Sejdić and Finci vs. B&H, Azra Zornić v B&H, B&H & Ilijaz Pilav vs. B&H*. In the judgment of the case of *Azra Zornić vs. B&H*, the European Court highlighted their expectations from Bosnia and Herzegovina to establish a democratic constitutional arrangement without discrimination based on ethnicity. With this statement The Court unequivocally asked for modifications in the Constitution of Bosnia and Herzegovina.

**KEYWORDS:** BOSNIA AND HERZEGOVINA – EUROPEAN COURT FOR HUMAN RIGHTS – CIVIL LAW – SEJDIĆ AND FINCI – AZRA ZORNIĆ – ILIJAZ PILAV – DISCRIMINATION – CONSTITUTION

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## THE EUROPEAN COURT FOR HUMAN RIGHTS CHANGES THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

*Harun Išerić*

### 1. The Constitution of Bosnia and Herzegovina - The Nightmare of Bosnia and Herzegovina

In December 2015, twenty years had passed since Bosnia had implemented a new Constitution. After the four-year-long war in which crime of genocide was committed,<sup>611</sup> the General Framework Agreement for Peace in Bosnia and Herzegovina,<sup>612</sup> whose Annex 4 is the Constitution of Bosnia and Herzegovina, was signed in Paris on 14<sup>th</sup> of February 1995. The agreement was written in the English language, and consequently, the Constitution of Bosnia and Herzegovina was thus written in the English language.<sup>613</sup> This is perhaps a unique case of a Constitution which was not written in the official language of the country and in fact, it has never been published in its official languages. The Constitution is relatively short, with only 12 articles<sup>614</sup> and two annexes.<sup>615</sup>

The Constitution primarily brought changes to the internal arrangement of Bosnia and Herzegovina. Country got divided into two entities - Republika Srpska (49% of the territory of Bosnia and Herzegovina) and the Federation of Bosnia and Herzegovina (51% of the territory of Bosnia and Herzegovina).<sup>616</sup> The Brčko Distrikt was established by a sub-sequential decision of The International Court of Arbitration. The entities have their constitutions and Brčko District also has its own constitution that is called the Statute. The

<sup>611</sup> See more: Judgment of the International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia) [2007] ICJ 2.

<sup>612</sup> General Framework Agreement for Peace in Bosnia and Herzegovina: Organization for Cooperation and Security in Europe Mission in Bosnia and Herzegovina. The agreement was signed by the representatives of Bosnia and Herzegovina, Croatia, Serbia, European Union, United States of America, France, United Kingdom, Russian Federation, and Federal Republic of Germany.

<sup>613</sup> The translation of the Constitution to Bosnian, Croatian, Serbian language was completed by The Office of The High Representative.

<sup>614</sup> Article I: Bosnia and Herzegovina, Article II: Human Rights and Fundamental Freedoms, Article III: Responsibilities of and Relations Between the Institutions of Bosnia and Herzegovina and the Entities, Article IV: Parliamentary Assembly, Article V: Presidency, Article VI: Constitutional Court, Article VII: Central Bank, Article VIII: Finances, Article IX: General Provisions, Article X: Amendment, Article XI: Transitional Arrangements, Article XII: Entry into Force.

<sup>615</sup> Annex One is Additional Human Rights Agreements to Be Applied in Bosnia and Herzegovina and Annex Two is Transitional Arrangements.

<sup>616</sup> Nedim Ademović and Christian Steiner, *Constitution of Bosnia and Herzegovina Commentary* (Konrad Adenauer Stiftung 2010).

Federation of Bosnia and Herzegovina subdivided into ten cantons. Each of the cantons has its own constitution. Moreover, each territorial unit has its own legislative, executive and judicial branch.

The Preamble of the Constitution states the following: 'Bosniaks, Croats, and Serbs, as constituent peoples (along with 'Others'), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows...'<sup>617</sup>. The Preamble, therefore, mentions the three population groups: constituent peoples, 'Others' and citizens of Bosnia and Herzegovina. Constituent peoples are the following: Bosniaks, Serbs and Croats. The word 'constitutionality' refers to the full equality and positive discrimination of members of these three groups when filing vacancies of state institutions and certain guaranteed special constitutional rights. The European Court for Human Rights, calls 'Others' as members of ethnical minorities, that do not declare themselves as members of any of the groups due to mixed marriages, mixed parenthood or due to other reasons are, and lastly 'Citizens' as those who declare them self as citizens of Bosnia and Herzegovina.<sup>618</sup>

The principle upon which the new constitutional and legal order of Bosnia and Herzegovina is based is ethnic-territorial. This principle is best presented through two state institutions: Presidency and the House of Peoples. The collective head of state is the Presidency of Bosnia and Herzegovina. It consists of three members: one Serb who is directly elected from territory of Republika Srpska, one Bosniak and one Croat directly elected from territory of the Federation of Bosnia and Herzegovina. The Parliamentary Assembly of Bosnia and Herzegovina is composed of two houses: the House of Representatives and the House of Peoples. The House of Representatives is the lower house whilst the House of Peoples is the upper house. It has fifteen delegates: two-thirds from the Federation of Bosnia and Herzegovina (five Croats and five Bosniaks) elected by the lower house of the Parliament of the Federation, one-third from Republika Srpska (five Serbs) chosen by the National Assembly of Republika Srpska. The House of Peoples, that is, the upper house, is in terms of power completely equal to the lower house, the House of Representatives. Both houses have to ratify international documents, accept laws and adopt state budget, in order for them to come into force. 'That makes it distinctively powerful and different from other upper houses in both Europe and the world'.<sup>619</sup> Only those who declare

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<sup>617</sup> Preamble of Constitution of Bosnia and Herzegovina. Constitution of Bosnia and Herzegovina.

<sup>618</sup> *Azra Zornić vs. Bosnia & Herzegovina* App no 3681/06 (ECHR, 15 July 2014) para 8.

<sup>619</sup> According to one comparative study from 1997, House of Peoples of Bosnia and Herzegovina, together with American Senate, is only upper house that has bigger power than lower house of Parliament: Nystuen Gro, *Achieving Peace or Protecting Human Rights?:*

themselves as members of constituent peoples can become candidates and elected/chosen to serve in two, previously mentioned, state institutions. This ethnical principle is related to the territorial principle: Bosniak and Croat, members of the Presidency and the House of Peoples are exclusively from the territory of Federation of Bosnia and Herzegovina, and Serb, member of the Presidency and the House of Peoples, is exclusively from the territory of Republika Srpska.

The presented ethnical principle is also reflected in legal order of entities. For example, the President and two Vice Presidents of entities how to be members of one of three constituent peoples. The President and two Vice Presidents of the Parliament Assembly of the Federation of Bosnia and Herzegovina have to come from three constituent peoples. President and vice presidents of Governments of Republika Srpska and the Federation of Bosnia and Herzegovina have to be members of one of three constituent peoples.

At a glance, the following discriminations can be identified in constitutional provisions of Bosnia and Herzegovina,

- a) Discrimination of 'Others' and citizens of Bosnia and Herzegovina in terms of composition of the Presidency and the House of People;
- b) Discrimination of the constituent peoples in terms of the House of People related to following: Bosniaks and Croats because they cannot be elected from the territory of Republika Srpska, and Serbs, because they cannot be elected from the territory of Federation of Bosnia and Herzegovina.
- c) Discrimination of constituent peoples regarding the Presidency of Bosnia and Herzegovina due to the following: Bosniaks and Croats cannot be elected on the territory of Republika Srpska, and Serbs cannot be elected from the territory of the Federation of Bosnia and Herzegovina.

Discrimination under the first point was confirmed by the judgments of the European Court for Human Rights in the cases of *Sejdić and Finci vs. Bosnia and Herzegovina*,<sup>620</sup> *Šlaku vs. Bosnia and Herzegovina*,<sup>621</sup> and *Azra Zornić vs.*

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*Conflict between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (Martinus Nijhoff Publisher 2005) 165.

<sup>620</sup> *Sejdić & Finci vs. Bosnia and Herzegovina* App no. 27996/06 & 34836/06 (ECHR 22 December 2009).

<sup>621</sup> *Šlaku vs. Bosnia and Herzegovina* App no. 56666/12 (ECHR 26 May 2016).

***Bosnia and Herzegovina***.<sup>622</sup> The judgment in the case of ***Ilijaz Pilav vs. Bosnia and Herzegovina***<sup>623</sup> confirmed discrimination described under the third point. There is still no judgment regarding discrimination under point two.

In Article II of the Constitution, *Human Rights and Fundamental Freedoms*<sup>624</sup>, it is stated that the European Convention on Human Rights and Fundamental Freedoms and its Protocols are directly applied in Bosnia and Herzegovina, and shall have supremacy over all other law. Hence, the Convention and Protocols have the same power as constitutional regulations. While considering the direct application of the Convention and its advantages over legislation, the Constitutional Court of Bosnia and Herzegovina determined that the Convention does not have the advantage over other constitutional regulations.<sup>625</sup>

In April 2002, Bosnia and Herzegovina became a member of the Council of Europe. When it became a member of the Council of Europe, Bosnia and Herzegovina committed itself to reviewing the electoral law regarding norms of the Council of Europe, and making changes where it is required within a year, with help from the Venice Commission. Also, in February 2008, the European Union stated that within two years it is expected from Bosnia and Herzegovina to 'amend electoral legislation regarding members of the Bosnia and Herzegovina Presidency and House of Peoples delegates to ensure full compliance with the European Convention on Human Rights and the Council of Europe post-accession commitments.'<sup>626</sup> That did not happen.

## **2. *Sejdić and Finci vs. Bosnia and Herzegovina***<sup>627</sup>

The first judgment of the Court, in which it found the violation of the article No.1 of Protocol No.12 (general prohibition of discrimination) of European Convention for the Protection of Human Rights and Fundamental Freedoms (Hereinafter referred to as ECHR), was in case ***Sejdić and Finci vs. Bosnia and Herzegovina***. The judgment was announced by the Grand Chamber in December 2009.

<sup>622</sup> *Azra Zornić vs. Bosnia and Herzegovina* App no. 3681/06 (ECHR 15 July 2014).

<sup>623</sup> *Pilav vs. Bosnia and Herzegovina* App no. 41939/07 (ECHR, 9 June 2016).

<sup>624</sup> Article II of Constitution of Bosnia and Herzegovina. Constitution of Bosnia and Herzegovina.

<sup>625</sup> Decisions U 5/04 and U 13/05.

<sup>626</sup> Council Decision 2008/211/EC of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2006/55/EC [2008] OJ L80/18.

<sup>627</sup> *Sejdić – Finci vs. Bosnia and Herzegovina* App no. 27996/06 & 34836/06 (ECHR, 22 December 2009).

The applicants were Dervo Sejdić, of Roma ethnicity, coordinator of Council of Roma in Bosnia and Herzegovina and Jakob Finci, of Jewish ethnicity, president of Jewish community in Bosnia and Herzegovina.

They argued that they cannot run for the position of a member of the Presidency of Bosnia and Herzegovina and the House of Peoples because of their origins, and thus referred to the following article of the ECHR: the prohibition of discrimination (Article 14 of ECHR), the right to free elections (Article 3 of Protocol No.1 of ECHR), and the general prohibition of discrimination (Article 1 of Protocol No.12 of ECHR).<sup>628</sup>

The Court stated that the fact that 'the present case raises the question of the compatibility of the national Constitution with the Convention is irrelevant in this regard'.<sup>629</sup> Strasbourg's Court concluded that Bosnia and Herzegovina might not be held responsible for passing these regulations, but can surely be held responsible for them still being valid.<sup>630</sup> The basis of discrimination is the ethnic origin which represents one type of racial discrimination.

In the application, the applicants stated that the state would have a difficult task if it tried to find an objective and acceptable justification regarding the foundation of the appeal (direct racial and ethnical discrimination) and the field in which it is applied (political participation and representation in the highest level of government), as well as the time frame in which this exclusion is taking place - ten years.

The government based its arguments on the attitudes of the Court in the case *Ždanoka vs. Latvia*,<sup>631</sup> and the historical context in which the Constitution of Bosnia and Herzegovina was created.<sup>632</sup>

The European Court first tested the applicability of Article 14 of ECHR in relation with Article 3 of Protocol No.1 of ECHR regarding elections for members of the House of Peoples. Since Article 3 of Protocol No.1 ECHR is referring only to elections for legislative authority, it was necessary to state whether the House of

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<sup>628</sup> Applicants also raised violation of Article 3 of ECHR (prohibition of torture) and Article 13 of ECHR (right to an effective remedy). The Court found these claims ill-founded.

<sup>629</sup> *Sejdić - Finci vs. Bosnia and Herzegovina* App no. 27996/06 & 34836/06 (ECHR 22 December 2009), para 29.

<sup>630</sup> *ibid* para 30.

<sup>631</sup> *Ždanoka vs. Latvia* App no. 58278/00 (ECHR, 16 March 2006).

<sup>632</sup> Government stated that Constitution came at the end of the most devastating conflict in modern European history in order to achieve peace and dialogue among three ethnical groups.

Peoples is a legislative authority.<sup>633</sup> Deciding whether something is considered a legislative authority is based upon the constitutional structure, the state's constitutional tradition and the extent of legislative jurisdiction. Considering the constitutional authorization, being the decisive factor for the Court, Article 14 in relation with Article 3 of Protocol No. 1 was declared to be applicable. Discrimination against ethnical origin is a sort of race discrimination<sup>634</sup>. The Court previously stated that none of the various acts, which can be exclusively or in a critical volume based on ethnical origin of an individual, cannot be objectively justified in the contemporary democratic society established on principles of pluralism and respect of other cultures.<sup>635</sup>

With these constitutional regulations, Court found one goal from the preamble of the Convention – being the establishment of peace. However, the Court emphasized the improvement and development which Bosnia and Herzegovina has made after signing the General Framework Agreement for Peace in Bosnia and Herzegovina - with establishing single military force, joining NATO's Partnership for Peace, signing the Stabilization and Association Agreement with European Union and membership in Security Council of United Nations.

Accordingly, long-term inability of the applicants to run for a member of the House of Peoples does not have an objective and acceptable justification, and it violates Article 14 related to Article 3 of Protocol No.1 of ECHR.

Regarding the elections for the Presidency of Bosnia and Herzegovina, the applicants adverted to Article 1 of Protocol No.12, which prohibits discrimination with regard to all the rights provided by the law. Since the constitutional regulations prevent candidacy for the Presidency, Article 1 of Protocol No. 12 is applicable. By not distinguishing the differences regarding the discrimination, that is, disaffiliation to any of the constituent peoples, the Court confirmed that there is no difference between the House of Peoples and the Presidency, and that the precondition, which refers to the suitability of candidacy for the elections for the Presidency, represents violation of Article 1 of Protocol No.12 of ECHR.<sup>636</sup>

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<sup>633</sup> Judge Mijović, in is partly concurring and partly dissenting opinion discusses applicability of Article 3 Protocol 1 on House of Peoples. Judge points out that Court concluded before that Article 3 Protocol 1 is applicable only on House of Representatives which composition is result of direct elections. Judge Mijović, finally concludes that there are no elections for House of Peoples – its members are chosen by entities parliaments.

<sup>634</sup> *Sejdić - Finci vs. Bosnia and Herzegovina* App no. 27996/06 & 34836/06 (ECHR, 22 December 2009), para 43.

<sup>635</sup> *D.H. and Others vs. Czech Republic* App no. 57325/00 (ECHR, 13 November 2007) para 176.

<sup>636</sup> Judge Mijović, from Bosnia, and judge Hajiev, had partially consentient and partially different opinion. Judge Boneli in his distinguished opinion described dramatically his disagreement: 'The Court did not affirm that the risk of civil war, avoidance of massacre or

### 3. *Azra Zornić vs. Bosnia and Herzegovina* <sup>637</sup>

Five years after the Sejdić and Finci judgment, the European Court of Human Rights announced the judgment on ***Azra Zornić vs. Bosnia and Herzegovina*** case. Azra Zornić declared herself as a citizen of Bosnia and Herzegovina. Hence, not as a member of constituent peoples, nor a member of 'Others' (like Dervo Sejdić and Jakob Finci were). She is member of third group stated in the preamble - the citizens of Bosnia and Herzegovina. In her appeal, she states that due to her affiliation she cannot run for a member of the Presidency of Bosnia and Herzegovina and cannot be a delegate in the House of Peoples of Bosnia and Herzegovina, which leads to violation of Article 1 of Protocol No. 12 of ECHR and Article 14 related to Article 3 of Protocol No. 1 of ECHR.<sup>638</sup>

The Government repeated similar arguments from the Sejdić-Finci case. It stated that the constitutional structure was established after 'the most destructive conflict in the modern history of Europe',<sup>639</sup> in order to establish peace and dialogue among the three ethnical groups. The government also stated that the applicant had willingly decided not to declare herself a member of any of the constituent peoples, and she could at any time choose to change that decision in case she would like to participate in the political life of Bosnia and Herzegovina. The Court claimed that this case was identical to Sejdić and Finci: 'Although, unlike the applicants in that case, who were of Roma and Jewish origin respectively, the present applicant does not declare affiliation with any particular group, she is also prevented from running for election to the House of Peoples on the ground of her origin.'<sup>640</sup>

The Court confirmed the applicant's assertions.<sup>641</sup> In the judgment the Court, in a very sharp tone, emphasizes that eighteen years after the end of the war, there could no longer be any reason for the maintenance of the contested discriminatory provisions.

The Court expects that democratic arrangements will be made without further delay ... The Court considers that the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples

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maintenance of territorial unity, has a social value big enough to justify certain limitations of rights of these two applicants. I cannot support the Court which sows ideals, but reaps bloodshed.'

<sup>637</sup> *Azra Zornić vs. Bosnia and Herzegovina* App no. 3681/06 (ECHR, 15 July 2014).

<sup>638</sup> *ibid* para. 13.

<sup>639</sup> *ibid* para. 24.

<sup>640</sup> *ibid* para. 30.

<sup>641</sup> *ibid* para. 33 and 37.



of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina.’<sup>642</sup>

#### 4. *Šlaku vs. Bosnia and Herzegovina*<sup>643</sup>

The Šlaku case is very similar to Sejdi-Finci case. The applicant was Samir Šlaku. He declares himself as member of Albanian national minority community in Bosnia. After he received confirmation by Bosnia and Herzegovina Electoral Commission that as member of national minorities cannot run for Presidency or House of Peoples he failed application to European Court for Human Rights. Applicant claimed violation of Article 14, Article 3 of Protocol No.1 and Article 1 of Protocol No. 12. Government has repeated the same arguments found in previous two cases. It also stated that constituent peoples also have limited their passive voting rights when it comes to elections for House of Peoples and Presidency. When it comes to House of Peoples, Court stated that this case ‘is identical to case Sejdić-Finci in which Court concluded that these constitutional provision lead to discriminatory treatment which is in contrary to Article 14 in relation to Article 3 of Protocol No.1’.<sup>644</sup> The Court concluded that beside a violation of Article 14 in relation to Article 3 of Protocol No.1, in relation to House of Peoples, there was also and violation of Article 1 of Protocol No. 12 – general prohibition of discrimination, due to continuous inability of applicant to run for member of this House. Following its practice in case Sejdić-Finci, Court stated that provisions which do not allow applicant to run for presidency are violating Article 1 of Protocol No. 1. of ECHR. In the judgment, the Court dedicated special attention to the Article 46 of the ECHR<sup>645</sup>. European Court for Human Rights stated that violation of human rights in the present case is a direct consequence of failure of Bosnian government to execute Sejdić-Finci judgment. ‘The failure of Bosnia and Herzegovina to adopt amendments to the constitution and electoral law in order to end current incompliance with ECHR ... represents the threat for future efficiency of mechanism of the Convention.’<sup>646</sup> The Court also stated that ‘more than 18 years after the end of tragic conflict, there cannot be any reason for keeping disputable constitutional provisions.’<sup>647</sup>

#### 5. *Iljaz Pilav vs. Bosnia and Herzegovina*<sup>648</sup>

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<sup>642</sup> *ibid* para 43.

<sup>643</sup> *Šlaku vs. Bosnia and Herzegovina* App no. 56666/12 (ECHR, 26 May 2016).

<sup>644</sup> *ibid* para 29.

<sup>645</sup> Binding force and execution of judgments.

<sup>646</sup> *Šlaku vs. Bosnia and Herzegovina* App no. 56666/12 (ECHR, 26 May 2016) para 37.

<sup>647</sup> *ibid* para 40.

<sup>648</sup> *Pilav vs. Bosnia and Herzegovina* App no. 41939/07 (ECHR, 9 June 2016).

Ilijaz Pilav declares himself to be a Bosniak. He lives in Srebrenica, on the territory of Republika Srpska. Ilijaz Pilav wanted to run for Serb presidency member from Republika Srpska. But, as he declares himself a Bosniak, Central Election Commission refused his application with an explanation that afore mentioned cannot be elected for the position from the territory of Republika Srpska since he declared himself as a Bosniak, but not as Serb. Ilijaz Pilav appealed to Constitution Court claiming that Article 1 Protocol 12 of ECHR was violated. Constitutional Court of Bosnia & Herzegovina found his appeal to be unfounded.<sup>649</sup> This is a case of discrimination of constituent peoples in relation to the territory they live on. This particular case refers to a Bosniak living on the territory of Republika Srpska who was not permitted to run for a member of Presidency from Republika Srpska because he declares himself to be a Bosniak.

Before the Court, the Government had repeated that Bosnia & Herzegovina could not be held responsible for Constitutional provisions as it is part of international agreement. Bosnia & Herzegovina also claimed that Mr. Pilav was not a victim as he could move to Federation of Bosnia and Herzegovina where he would enjoy his right to vote and stand for election without restriction.<sup>650</sup> It means that Mr. Pilav could change his residency at any time. In addition, Government repeated arguments presented in case *Zorić vs. Bosnia and Herzegovina*.<sup>651</sup>

In its observations, the Court states that the applicant lives in Bosnia & Herzegovina and that presidency is a political body of the State. It is not an entity institution. 'Its policy and decisions affect all citizens of Bosnia and Herzegovina.'<sup>652</sup> In its conclusion, the Court states that applicant exclusion from election to the Presidency is based on a combination of ethnic origin and place of residence and, as such 'amounts to the discriminatory treatment in breach of Article 1 of Protocol No. 12 of ECHR.'<sup>653</sup> This judgment was delivered on 9<sup>th</sup> June 2016.

## 6. The consequences of the judgments and proposals for their implementation

These are some of the rare judgments brought by the European Court which have shaken the very foundations of the constitutional arrangement of one Member State of the Council of Europe. Stated judgments of the European Court for Human Rights are not related solely to the elections of Presidency and the

<sup>649</sup> Constitutional Court of Bosnia and Herzegovina referred to case *Ždanoka vs. Latvia*.

<sup>650</sup> *Pilav vs. Bosnia and Herzegovina* App no. 41939/07 (ECHR, 9 June 2016) para 23.

<sup>651</sup> *ibid* para 31 – 34.

<sup>652</sup> *ibid* para 45.

<sup>653</sup> *ibid* para 48.

House of Peoples of Bosnia and Herzegovina. They will affect the whole set of institutions and functions in Bosnia. It means that massive changes in the legal order of Bosnia and Herzegovina will have to be taken. For illustration purposes, the following legal provisions will have to be modified: president and two vice presidents of the House of Representatives of Bosnia and Herzegovina are chosen from constituent peoples, president and two vice presidents of Republika Srpska and the Federation of Bosnia and Herzegovina are also chosen from constituent peoples, president and two vice presidents of cantonal assemblies in the Federation of Bosnia and Herzegovina are chosen from constituent peoples, etc. The ethnic-territorial principle of political and legal order will have to be dismissed.

Due to failure to fulfil judgment in case *Sejdić-Finci* Bosnia and Herzegovina is risking to be the first country to be kicked out of Council of Europe. Minority Rights Group International has asked Committee of Ministers of Council of Europe to initiate infringement proceedings<sup>654</sup> in accordance with article 46 (binding force and execution of judgments) point 4 of European Convention. Infringement proceedings consist from two steps: Committee of Ministers will serve formal notice to Bosnia and Herzegovina by interim resolution and then Committee shall adopt decision referring to the ECHR with the question whether Bosnia and Herzegovina has fulfilled final Court's decision in case *Sejdić-Finci*.<sup>655</sup> After Court's answer, which in case of *Sejdić-Finci* judgment implementation, is going to be negative, the Committee will take other measures. The only left one is mechanism in Article 8 of Council of Europe Statute.<sup>656</sup> In accordance with article 8, member state may be suspended from its rights of representation and could be requested by the Committee of Ministers to withdraw from Council of Europe. 'If such member state does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.'<sup>657</sup> Previously, Committee of Ministers has increased communication with Bosnia and Herzegovina and eximination of *Sejdić-Finci* case. It was followed with three interim resolutions.<sup>658</sup> In the last interim resolution from 2013, Committee strongly urged all government and political leaders of Bosnia and Herzegovina to ensure that the constitutional and

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<sup>654</sup> Secretariat of the Committee of Ministers, 'Communication from NGO (Minority Rights Group International) in the case of *Sejdić and Finci* against Bosnia and Herzegovina' <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168069794d>> accessed 1 August 2016.

<sup>655</sup> *ibid* 3.

<sup>656</sup> Statute of the Council of Europe, art 8.

<sup>657</sup> *ibid*.

<sup>658</sup> Committee of Ministers, Interim resolution CM/ResDH (2011) 291, adopted 2 December 2011; Committee of Ministers, Interim resolution CM/ResDH (2012) 233, adopted 6 December 2012 & Committee of Ministers, Interim resolution CM/ResDH (2013) 259, adopted 5 December 2013.

legislative framework is immediately brought into line with the requirements of the Convention, so that the elections in October 2014, are held without any discrimination against those citizens who are not connected with any of the 'constituent peoples'.<sup>659</sup> Parliamentary Assembly of Council of Europe in its recommendation from 2013 called B&H to 'amend the constitution and electoral law to comply with the Sejdić-Finci case without delay'.<sup>660</sup> Human Rights Watch and Minority Rights Group International in their communication with the Committee of Ministers from December 2015 stated that the non-implementation of judgment Sejdić-Finci has far reaching consequence and that it 'undermine[s] legitimacy of Conventional system'.<sup>661</sup> The request of Minority Rights Group International will be examined in September 2016.

Since the judgment in case Sejdi-Finci was announced, in December 2009, the European Union starting making its implementation a key condition for Stabilisation and Association Agreement between EU and Bosnia and Herzegovina to enter into the force. EU Progress report from 2014 on Bosnian and Herzegovina stated that,

Full implementation of the Sejdić-Finci ruling is a key element for Bosnia and Herzegovina's membership application to be considered as credible by the EU. Moreover, the compliance of the country's Constitution with the European Convention on Human Rights as regards the Sejdić-Finci judgment remains to be ensured.<sup>662</sup>

The first to implement the judgment of Sejdić and Finci was Sarajevo Canton. In January 2013, Sarajevo Canton, one of the ten in the Federation of Bosnia and Herzegovina, adopted the amendments to the Constitution of Sarajevo Canton, by which the Sejdić and Finci judgment was implemented. Based on the previous legislation, the cantonal assembly had one presidents and two vice presidents who were chosen from the three constituent peoples. With the modified Constitution, the Presidency has one president and three vice presidents coming

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<sup>659</sup> Committee of Ministers, Interim resolution CM/ResDH (2013) 259, adopted 5 December 2013.

<sup>660</sup> Council of Europe Recommendation 2025, Parliamentary Assembly of the Council of Europe, 'The functionality of democratic institutions in Bosnia and Herzegovina' (2013) 12.

<sup>661</sup> Secretariat of the Committee of Ministers, 'Communication from NGOs (Human Rights Watch and Minority Rights Group International) in the case of Sejdić and Finci against Bosnia and Herzegovina' 10  
<<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804ae87a>> accessed 2 August 2016/

<sup>662</sup> European Commission, 'Bosnia and Herzegovina 2014 Progress Report' (2014)  
<[http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/20141008-bosnia-and-herzegovina-progress-report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-bosnia-and-herzegovina-progress-report_en.pdf)> accessed 15 February 2016.

from among one of the constituent peoples and from among the category of 'Others'. Nine other cantons are expected to do the same.

In 2014, general elections in Bosnia and Herzegovina were held. Once again Roma, Jews, 'Others' and the citizens of Bosnia and Herzegovina were not allowed to run for election to the Presidency of Bosnia and Herzegovina and the House of Peoples. In the past years, the representatives of European Union organised a series of meetings with the presidents of leading Bosnian parties in order to find appropriate constitutional amendments through which the judgment of Sejdīć and Finci, and Azra Zornić against Bosnia and Herzegovina would be implemented. All of them ended unsuccessfully.<sup>663</sup> There were several proposals for implementation of the judgments.

Two proposals came from the international community. The first one is called the April package.<sup>664</sup> Several years before the Sejdīć-Finci judgment, the April package of constitutional changes was proposed, written under the auspices of the United States of America. The same structure of the House of Peoples was kept, however, with excessively narrowed-down powers of the House.<sup>665</sup> Amendments did not explicitly prescribe for members of the Presidency to be from the three constituent peoples, but they could not be from the same constituent nation. They were chosen by the Parliament Assembly of Bosnia and Herzegovina. With these amendments, there still would not be place for 'Others' and citizens of Bosnia and Herzegovina in House of Peoples, or Croat and Bosniak members could be elected from RS and Serbian from Bosnia and Herzegovina in the House. But as an 'extent of the legislative powers enjoyed by House of Peoples was a decisive factor'<sup>666</sup> for applicability of Article 3 of Protocol No 1. in case Sejdīć-Finci, if authorities would have been reduced, it is questionable whether the European Court would find discrimination of Others and citizens of Bosnia and Herzegovina. But, the April package still discriminates constituent peoples regarding composition of House of Peoples, as only Bosniak and Croat members are chosen from Federation of Bosnia and Herzegovina and Serb members only from Republika Srpska.

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<sup>663</sup> 'Ethnically based discrimination in Bosnia and Herzegovina constitutional system' (*Coalition Equality*, 2014)  
<[http://eu-monitoring.ba/site/wp-content/uploads/2014/06/Written-Submission\\_EU-Progress-Report-2014\\_Ethnic-based-discrimination\\_Coalition-Jednakost.pdf](http://eu-monitoring.ba/site/wp-content/uploads/2014/06/Written-Submission_EU-Progress-Report-2014_Ethnic-based-discrimination_Coalition-Jednakost.pdf)> accessed 2 August 2016.

<sup>664</sup> The April Package is package of constitution amendments. It is named after month in which it was rejected by Bosnian parliament in 2006.

<sup>665</sup> Powers of House of Peoples would be: adoption of constitutional amendments, right of veto due to protection of vital national interest, and election of the president and the vice president of Bosnia and Herzegovina.

<sup>666</sup> *Sejdīć - Finci vs. Bosnia and Herzegovina* App no. 27996/06 & 34836/06 (ECHR, 22 December 2009) para 41.

The second proposal was made during the Butmir process. The Butmir process, which started in 2009, was led by the representatives of the European Union. It envisioned the House of Peoples having reduced legislations, narrowed down to those in the April Package. The arrangement would remain the same. Modifications related to the Presidency of Bosnia and Herzegovina were identical to those proposed in the April Package. The Butmir process did not lead to any amendments in Parliament procedure and it was a total failure on behalf of EU officials. As described previously, this proposal discriminates constituent peoples regarding composition of House of Peoples.

They were a number of proposals by the non-governmental sector. The proposal of the Coalition Equality abolishes the Presidency of Bosnia and Herzegovina and the House of Peoples. Powers of the Presidency would be transferred to Council of Ministers and powers of House of peoples would be transferred to the House of Representatives. The House of Representatives would thus be the Parliament of Bosnia and Herzegovina. This perhaps was the best proposal from a financial perspective. It also would solve the complicated structure and means of how delegates are chosen in House of Peoples.

The proposal of the Council of National Minorities of Bosnia and Herzegovina<sup>667</sup> increase number of delegates of House of Peoples for four delegates coming from group of 'Others' - two from the Federation of Bosnia and Herzegovina and two from Republika Srpska proposed by the Council of National Minorities of Bosnia and Herzegovina. It also increased the number of Presidency member with one more member, which would come from the group of national minorities, nationally uncommitted, or citizens of Bosnia and Herzegovina. Implementation of this proposal would request additional funding. On the other hand, it does not solve discrimination of Serbs in Federation of Bosnia and Herzegovina and Croats and Bosniaks in Republika Srpska as they would not be able to run for House of Peoples.

The third proposal coming from the civil sector is the proposal of the Forum of Tuzla Citizens.<sup>668</sup> The House of Peoples would be expanded to number of thirty-

<sup>667</sup> National Minority Council, 'Proposal of amendments on Constitution of Bosnia and Herzegovina' (2012) <<http://www.ustavnareforma.ba/files/articles/20120903/380/bs.%20Vije%C4%87e%20nacionalnih%20manjina,%20Prijedlog%20izmjene%20Ustava%20BiH,%2003.09.2012.pdf>> accessed 19 June 2016.

<sup>668</sup> Citizens of Tuzla Forum, 'Proposal of Forum of Tuzla Citizens on how to implement the judgments of the European Court of Human Rights in Strasbourg in the case of Sejdic and Finci vs. Bosnia and Herzegovina, as well as the decision of the Constitutional Court of Bosnia and Herzegovina on the equality of all three constituent peoples on the whole territory of Bosnia and Herzegovina' (2011)

one delegates, from which seventeen would be from the Federation of Bosnia and Herzegovina (six Bosniaks, six Croats and three Serbs, and two from among national minorities and the nationally uncommitted) and fourteen from Republika Srpska (six Serbs, three Bosniaks, three Croats, and three from among the national minorities and nationally uncommitted). The House of Peoples would keep its authorization. Regarding the authority of the Presidency of Bosnia and Herzegovina, it would be expanded to another member from the national minorities, the nationally uncommitted and the citizens of Bosnia and Herzegovina. This proposal implements fully judgments of European Court and also enables Serbs from Federation of Bosnia and Herzegovina and Croats and Bosniaks to run for the House of Peoples. In order to implement this proposal additional funding is needed. The Association Alumni of the Centre for Interdisciplinary Postgraduate Studies (ACIPS) in Bosnia and Herzegovina<sup>669</sup> recommends an increase in the number of the House of Peoples to thirty-two. According to the proposal, delegates from the constituent peoples are elected from both entities, and from both entities, there are two delegates coming from 'Others'. What is new in this proposal, unlike others, is that the Brčko District is now electing one representative from the constituent peoples and one among 'Others'. Unlike the other proposals, according to this one, Bosnia and Herzegovina does not have a vice president or a presidency, but only one president. ACIPS's proposal eliminates discrimination in composition of House of Peoples. It is unexpected that political elites would give up on vice-presidents' chairs.

Serb, Croat and Bosniak leading political parties have also made proposals for constitutional reform. According to the proposal of leading Serb Parties, Union of Independent Social Democrats (SNSD) and Serbian Democratic Party (SDS), the House of People would have 3 delegates from among 'Others' (1 from RS and two from the Federation of Bosnia and Herzegovina). When it comes to Presidency, verdict would be implemented in the way that in Constitution would be stated that two members are elected from Federation of Bosnia and Herzegovina and one from Republika Srpska (without ethnical determination).<sup>670</sup> In the same way as the April package had shown, the proposal

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<<http://www.ustavnareforma.ba/files/articles/20111103/368/bs.%20Forum%20gradjan%20Tuzla%20-Privremena%20komisija,%2003.11.2011.pdf>> accessed 19 June 2016.

<sup>669</sup> Association Alumni of the Centre for Interdisciplinary Postgraduate Studies, 'Proposal of amendments on Constitution of Bosnia and Herzegovina' (2011)

<<http://www.ustavnareforma.ba/files/articles/20111103/370/bs.%20ACIPS%20%20prijedlog%20amandmana%20na%20Ustav%20BiH%20-%20Privremena%20komisija,%2003.11.2011.pdf>>, accessed 2 June 2016.

<sup>670</sup> 'Proposal of amendments on Constitution of Bosnia and Herzegovina' (2012) <<http://www.ustavnareforma.ba/files/articles/20120830/382/bs.%20SNSD%20i%20SDS,%20Prijedlog%20amandmana%20na%20Ustav%20BiH,%2030.08.2012.pdf>> accessed 20 June 2016.

discriminates constituent peoples regarding House of Peoples, as only Bosniak and Croat members are chosen from Federation of Bosnia and Herzegovina and Serb members only from Republika Srpska.

The proposal of leading Croat parties, Croatian Democratic Union (HDZ)<sup>671</sup> and Croatian democratic Union 1990 (HDZ 1990),<sup>672</sup> states that delegates of House of Peoples, from among the constituent peoples are elected from both entities, provided also that two of them are from among national minorities in the Federation of Bosnia and Herzegovina and from among national minorities in Republika Srpska. The Presidency according to the proposal is elected by the Parliament Assembly of Bosnia and Herzegovina. It consists of three members. These three members cannot be affiliated to the same constituent peoples.<sup>673</sup> This proposal completely fulfil judgments of European Court and complies constitution with ECHR.

The proposal of the leading Bosniak party, Party of Democratic Action, (SDA)<sup>674</sup> is close to the already mentioned April Package. What is quite novel is that it provides the category of 'Others' with a certain number of seats in the House of Representatives, lower house of Parliament. If yet the current powers of the House of Peoples would remain, national minorities would be represented in House of Peoples by two delegates from the Federation of Bosnia and Herzegovina and one from Republika Srpska. The proposal eliminates the disadvantages of the April package described before. However, if the House of Peoples would keep it powers, proposal would still discriminates constituent peoples regarding Hose of Peoples, as only Bosniak and Croat members could be chosen from Federation of Bosnia and Herzegovina and Serb members only from Republika Srpska.

## 7. Conclusion

It is rather difficult to predict when the Bosnian Parliament will change the Bosnian Constitution in order to implement the judgments handed down by the European Court for Human Rights. In the past, all reforms were conducted with support and pressure of the United States of America and European Union. It should not be expected that there will be constitutional reform without carrot-and-stick policy of any of these two forces. In the meantime, we could expect additional judgments of the Court because of non-compliance of Bosnia and Herzegovina Constitution with ECHR.

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<sup>671</sup> Member of European People's Party.

<sup>672</sup> Member of European People's Party.

<sup>673</sup> Proposal of amendments to the Constitution of Bosnia and Herzegovina.

<sup>674</sup> Member of European People's Party.



For six years, a key condition for Bosnian progress on the EU path was implementation of the Sejdić-Finci judgment. However, this has led Bosnia and Herzegovina to nowhere. Bosnia and Herzegovina has made no progress in constitutional reform either on EU access path. Due to that, in 2015, Germany and UK launched a new initiative for Bosnia and Herzegovina. Soon enough, EU Foreign Affairs Council adopted this new initiative and it became new EU approach for Bosnia. The new approach has put in the foreground social-economic reforms. Sejdić-Finci is not priority any more. This is how the only real and powerful pressure on Bosnia to implement European Court of human Rights decisions disappeared.

Finally, the issue which these judgments give rise to a question regarding the limits of the European Court's jurisdiction. Has it become the European Constitutional Court? For the first time in the history, European Court for Human Rights has challenged the Constitutional of Council of Europe member state. Due to these judgments, European Convention for Protection of Human Rights and Fundamental Freedoms, has become the heights legal act in Council of Europe state members, being above member states constitutions.